IN THE SUPREME COURT FOR THE STATE OF ALASKA

STATE OF ALASKA, DIVISION OF ELECTIONS, and GAIL FENUMIAI, in her capacity as Director of the Division of Elections,

Petitioners,

v.

ALYSE GALVIN,

Respondent.

Superior Case No. 3AN-20-7991 CI

Supreme Court No. S-17887

**NOTICE OF ERRATA**

Respondent, Alyse Galvin, provides the following correction to its Opposition to Petition for Review:

The heading on the first page should read: "IN THE SUPREME COURT FOR THE STATE OF ALASKA." The Conclusion should read: "For the foregoing reasons, Respondent respectfully requests that the Court allow the Superior Court's temporary restraining order to stand and preclude Petitioners from mailing and further printing any ballots that do not comply with the law." The footer should only contain the page number.

Filed with this Errata is a corrected Opposition to Petition for Review.

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DATED: September 18, 2020.

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IN THE SUPREME COURT FOR THE STATE OF ALASKA

| | |
|---|---|
| STATE OF ALASKA, DIVISION OF ELECTIONS, and Gail Fenumiai, Director of the Division of Elections<br><br>Petitioners,<br><br>v.<br><br>ALYSE S. GALVIN,<br><br>Respondent. | Superior Court Case No. 3AN-20-07991 CI<br><br>Supreme Court Case No. S-17887 |

**OPPOSITION TO PETITION FOR REVIEW**

Petitioners have filed an emergency petition asking the Court to intervene in an ongoing Superior Court proceeding to prevent alleged "chaos" *they* created when they altered the 2020 general election ballot without any notice. The only chaos that will result here is if the Division of Elections mails out ballots that violate Alaska Statutes and the Constitutional rights of all Alaskans, potentially calling the entire election into question. Petitioners have created a tough situation for themselves by printing thousands of improperly altered ballots *before* posting the sample ballot for candidate and public review. But the hard work that it will take to correct the situation does not justify allowing this wrong to go uncorrected. Too much is at stake.

This case concerns the fundamental and constitutionally-protected right to freedom of political association as guaranteed by Article I, Section 5 of the Alaska

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Constitution—a right even more robust than that guaranteed by the First Amendment of the U.S. Constitution—as well as Petitioners' obligations to follow Alaska Statutes and the rule of law. Contrary to their claims of a "design" change, the State has substantively altered the general election ballot by removing important identifying information about each candidate, and has taken this radical step without any notice to impacted parties (such as Respondent) and after ballots have already been printed, in a clear effort to avoid legitimate legal challenges such as this one. To protect the rights of all Alaskans, Respondent respectfully requests that this Court deny Petitioners' Petition for Review and preclude them from violating the Alaska Constitution and the plain terms of AS 15.15.030(5). Petitioners must not be permitted to mail any ballots that do not comply with the law.

## BACKGROUND

In 2018, this Court held that the Division of Elections violated Article I, Section 5 of the Alaska Constitution when it prohibited the Alaska Democratic Party from allowing independent voters to participate as candidates in Democratic primary elections. *See generally State v. Alaska Democratic Party*, 426 P.3d 901 (Alaska 2018) ("*ADP*"). Since then, independent, non-partisan, and unaffiliated voter candidates have been permitted to participate in Democratic primaries, thereby allowing candidates to essentially hold two separate political associations: (1) their "party affiliation," which

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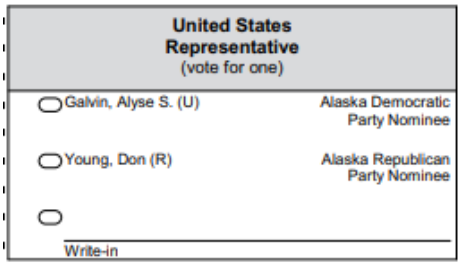
identifies the party with which they affiliate as a voter (if any), and (2) their "party designation," which identifies the political party whose nomination they have received.

***Ballot design since 2018***

In all elections since *ADP* was decided, Petitioners have prepared and printed ballots consistent with AS 15.15.030(5) to indicate the party affiliation (if any) of the candidate and the primary the candidate is running in, or party by which the candidate was nominated, as shown in the excerpt from the 2018 general election sample ballot below:



[1]

The same was true in the 2018 primary election, as reflected by the sample ballot:

[1] *State of Alaska (Sample) Federal Election Ballot, November 6, 2018*, https://elections.alaska.gov/election/2018/General/SampleBallots/GEN%2018%20FEDERAL%20Sample.pdf.

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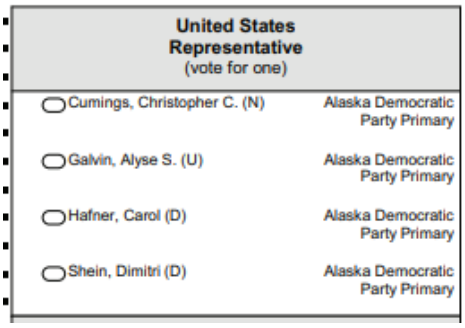
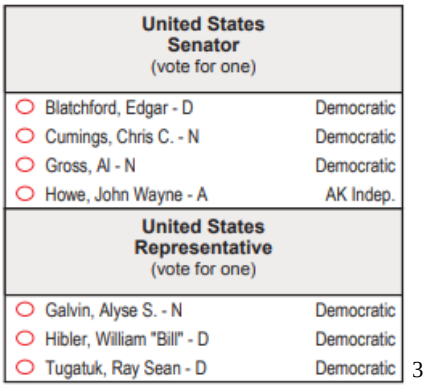


**United States Representative**
(vote for one)

| | |
|---|---|
| Cumings, Christopher C. (N) | Alaska Democratic Party Primary |
| Galvin, Alyse S. (U) | Alaska Democratic Party Primary |
| Hafner, Carol (D) | Alaska Democratic Party Primary |
| Shein, Dimitri (D) | Alaska Democratic Party Primary |

[2]

And Petitioners took the same, consistent approach again in the 2020 Primary election, held just a few months ago:



**United States Senator**
(vote for one)

| | |
|---|---|
| Blatchford, Edgar - D | Democratic |
| Cumings, Chris C. - N | Democratic |
| Gross, Al - N | Democratic |
| Howe, John Wayne - A | AK Indep. |

**United States Representative**
(vote for one)

| | |
|---|---|
| Galvin, Alyse S. - N | Democratic |
| Hibler, William "Bill" - D | Democratic |
| Tugatuk, Ray Sean - D | Democratic |

[3]

However, on September 14, without warning or explanation, Petitioners published the below sample ballot for the 2020 general election. Without warning or clear

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[2] *State of Alaska Official (Sample) Ballot, Primary Election, August 21, 2018*, https://www.elections.alaska.gov/election/2018/Primary/SampleBallots/HD1%20ADL%20Sample.pdf.

[3] *State of Alaska Official (Sample) Ballot, August 18, 2020, Alaska Democratic Party Primary, Alaskan Independence Party Primary*, https://www.elections.alaska.gov/election/2020/Primary/SampleBallots/FED%20AD.pdf.

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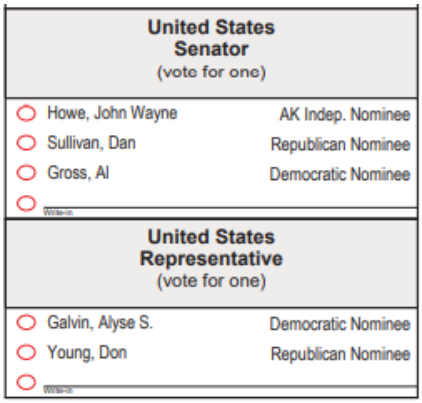
explanation and in direct violation of the clear language of AS 15.15.030(5), Petitioners have pivoted to *omitting* party affiliation information from the ballot entirely. The 2020 sample federal ballot, which Petitioners published on Monday of this week, lists candidate names as follows:



**United States Senator**
(vote for one)

| | |
|---|---|
| ○ Howe, John Wayne | AK Indep. Nominee |
| ○ Sullivan, Dan | Republican Nominee |
| ○ Gross, Al | Democratic Nominee |
| ○ Write-in. | |

**United States Representative**
(vote for one)

| | |
|---|---|
| ○ Galvin, Alyse S. | Democratic Nominee |
| ○ Young, Don | Republican Nominee |
| ○ Write-in. | |

[4]

Galvin first learned of Petitioners' abrupt and unexplained change only three days ago, the same day that the sample ballot was first released, through a report first published on Twitter.[5] Her campaign then reviewed the sample ballot published that same day on the Division of Elections website and confirmed that it was consistent with the sample ballot posted on Twitter. The Anchorage Daily News reported that Defendant Fenumiai

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[4] *State of Alaska Official (Sample) Ballot, General Election, November 3, 2020*, https://www.elections.alaska.gov/election/2020/General/SampleBallots/FED.pdf.

[5] @alaskalandmine, TWITTER (Sept. 14, 2020), https://twitter.com/alaskalandmine/status/1305590538314289152?s=21.

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said she "unilaterally" decided, on Monday, September 14, to make the change.[6]

This last-minute decision was announced perilously close to the federal deadline for mailing absent stateside and overseas uniformed service member and overseas civilian ballots, which is no later than 45 days before election day. *See* 52 U.S.C. § 20302(a)(8). For the November 3, 2020 general election, that deadline is this Saturday, September 19. Petitioners now argue that there is no time for them to change the ballot and still comply with this law.

***Party affiliation***

Party affiliation is a uniquely important facet of Alaska demographics, since few Alaskans formally affiliate with any political party. More than half of all Alaska voters are registered as Non-Partisan or Undeclared.[7] Only 13% of Alaska voters identify and are registered as Democrats in voter registration records, and only 24% identify and are registered as Republicans. In contrast, and unlike in most other states, over 58% of Alaska

[6] James Brook and Aubrey Weiber, *A late change to the 2020 General Election ballot sparks outcry from Alaska Democrats*, Anchorage Daily News (Sept. 14, 2020), https://www.adn.com/politics/2020/09/14/a-late-change-to-the-2020-general-election-ballot-sparks-outcry-from-alaska-democrats/ (reporting that "[l]ooking at the ballot alone, there's no way to tell that [candidates are] independents or non-partisan").

[7] State of Alaska, Division of Elections, Number of Registered Voters by Party within Precinct (Sept. 3, 2020), https://www.elections.alaska.gov/statistics/2020/SEP/VOTERS%20BY%20PARTY%20AND%20PRECINCT.htm#STATEWIDE.

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voters identify and are registered as Non-Partisan or Undeclared. *Id.* In other words, more than half of Alaska voters choose not to affiliate with any political party and to exercise their freedom of association by explicitly registering with the State as *not* affiliated.

Galvin was registered and identified as an Undeclared voter for well over a decade. Verified Compl. ¶ 25. In 2019, she changed her registration from Undeclared to Non-Partisan. Galvin changed her registration because Non-Partisan best represents her beliefs and political objectives, and it is how she self-identifies and chooses to associate as a voter. *Id.* at ¶¶ 26-27.

That Galvin has won her Democratic Primary election and, for the second time, is running as the nominee of the Alaska Democratic Party has not changed or altered how Galvin identifies as a voter. *Id.* at ¶ 28. Galvin's personal voter registration affiliation as Non-Partisan, and formerly as Undeclared, is and has been an important part of her identity, her campaign platform, and her relationship with her supporters. *Id.* at ¶¶ 28-29.

**THE COURT SHOULD DENY THE PETITION FOR REVIEW**

The Superior Court entered a well-reasoned temporary restraining order based upon a plain reading of an Alaska Statute. Recognizing the time-sensitive nature of the issues raised, the Superior Court also ordered additional legal briefing (now filed) and a hearing scheduled for tomorrow at 10:30am. Instead of taking immediate action to print the estimated 8,000 corrected ballots they allege are required to be mailed by 6pm

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tomorrow, the State has elected to seek Supreme Court review at the risk of compromising the rights of all Alaskans.

In support of their petition, Petitioners allege that the Division of Elections will miss a federal deadline and will be forced to divert enormous resources in a desperate scramble to comply with the Superior Court's order. The State also argues that postponement of review will result in "injustice" because of "unnecessary delay, expense in hardship." Pet. at 4. In addition to being vague, the State's assertion is incorrect. The fact that the State will need to expend "money, time, and energy" to comply with the relief granted is irrelevant to the propriety of the relief, and does not warrant setting it aside. *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). The only injustice is allowing altered ballots to be mailed in violation of the law, and allowing the State's last-minute actions to compromise the electoral process. Finally, as explained herein, the State has the clear option of obtaining an exemption to this Saturday's federal deadline to provide additional time to get things right.

The temporary restraining order was properly entered, and immediate review is not necessary or warranted. The merits likewise support the verified complaint filed by Alyse Galvin.

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## THE TEMPORARY RESTRAINING ORDER WAS PROPERLY GRANTED

### I. Legal standard for temporary restraining order.

Under Alaska Rule of Civil Procedure 65, this Court applies two different tests, depending on the "the nature of the threatened injury," to determine whether a Respondent is entitled to a temporary restraining order or preliminary injunction. *State, Division of Elections v. Metcalfe*, 110 P.3d 976, 978 (Alaska 2005).

> If the Respondent faces the danger of irreparable harm and if the opposing party is adequately protected, then we apply a balance of hardships approach in which the Respondent must raise serious and substantial questions going to the merits of the case; that is, the issues raised cannot be frivolous or obviously without merit. If, however, the Respondent's threatened harm is less than irreparable or if the opposing party cannot be adequately protected, then we demand of the Respondent the heightened standard of a clear showing of probable success on the merits.

*Id.* (internal quotation marks and citations omitted). "The balance of hardships is determined by weighing the harm that will be suffered by the Respondent if an injunction is not granted, against the harm that will be imposed upon the defendant by the granting of an injunction." *State v. Kluti Kaah Native Village*, 831 P.2d 1270, 1273-73 (Alaska 1992), *quoting A.J. Industries, Inc., v. Alaska Public Service Comm'n*, 470 P.2d 537, 540 (Alaska 1970), *modified in other respects*, 483 P.2d 198 (Alaska 1971).

Under either the "balance of the hardships" or "probable success on the merits"

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test, Respondent should prevail because the requirements of AS 15.15.030(5) are clear and are not met on Petitioners' current ballot, as detailed below.

## II. The TRO should stand because Galvin is at risk of immediate irreparable harm.

There is little doubt that Galvin is at severe risk of irreparable harm, as the Superior Court's Temporary Restraining Order confirms. She is deprived of the right to fully express her political affiliation—and thus, political association—on the ballot, and non-partisan voters who wish to affiliate with a like-minded candidate are denied this opportunity by Petitioners' arbitrary, eleventh-hour action. *See Bullock v. Carter*, 405 U.S. 134, 143 (1972) ("[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."). Galvin's irreparable harm derives from the fact that freedom of political association is a fundamental right under the Alaska Constitution. *See* Alaska Const. art. I, § 5; *State, Div. of Elec. v. Green Party of Alaska,* 118 P.3d 1054,1064-65 (Alaska 2005); *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982). Indeed, the Alaska Constitution is more protective of political associational rights than even the federal constitution. *ADP*, 426 P.3d at 911.

The deprivation of such a right undoubtedly constitutes irreparable injury. *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (*citing Elrod v. Burns*, 427 U.S.

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347, 373 (1976)); *see also Mat-Su Coal. for Choice v. Valley Hosp.*, No. 3PA-92-1207, 1993 WL 13013293, at *3 (Alaska Super. Ct. Feb. 9, 1993) ("Respondents also cite significant authority for the proposition that they will suffer per se harm from the denial of a fundamental constitutional right."). Such harm is particularly problematic and irreparable in the electoral context, as "once the election occurs, there can be no do-over and no redress." *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224, 247 (4th Cir. 2014).

## III. The TRO should stand because any risk of harm to Petitioners is of their own making, and is, in any event, not irreparable.

Galvin's risk of irreparable harm stands in stark contrast to any putative harm facing Petitioners, which Petitioners themselves conceded, in argument before the Court yesterday, is negligible. Not only has Galvin posted a bond as ordered by the Court to indemnify any injury, *see Alaska Pub. Utilities Comm'n*, 534 P.2d at 554, but Petitioners *admitted* that the monetary cost of reprinting ballots poses no significant harm to the state. *See* Ex. A, *Log notes of Hearing on Motion for TRO*, September 16, 2020, 12:30 p.m. Indeed, the only potential injury that Petitioners articulated was that the federal deadline to send its 11,000 Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA") ballots is fast approaching and that the Division of Elections *may* need more time to determine its printer's software capabilities. Ex. B at 4; *see also* 52 U.S.C. § 20302(a)(8)

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(UOCAVA deadline). But any hypothetical technological hurdles associated with reprinting 11,000 ballots by the end of the week are "inconsiderable" when compared to the harm of mailing legally defective ballots to Alaska voters. *Alaska Pub. Utilities Comm'n*, 534 P.2d at 554. In the prior words of the State, a ballot that only lists the candidate's nominating party with "mislead voters." Ex. B, Brief of Appellant State of Alaska, *State v. Alaska Democratic Party*, Supreme Court No. S-16875 (Dec. 18, 2017) ("State's 2018 Brief"), at 39.

In addition to the fact that the State, if pushed, could print corrected ballots before the deadline without significant harm, Petitioners are more than adequately protected from any injury associated with a failure to comply with the federal deadline by the hardship exemption *that is built into that federal deadline itself*. *See* 52 U.S.C. § 20302(g)(1). Under that exemption, "[I]f the chief State election official determines that the State is unable to meet the [45-day requirement] with respect to an election for Federal office due to an undue hardship described in paragraph (2)(B), the chief State election official shall request that the Presidential designee grant a waiver to the State of the application of such subsection." This hardship exemption specifically contemplates litigation as justification for such delay. 52 U.S.C. § 20302(g)(2)(B) (listing as an undue hardship that "[t]he State has suffered a delay in generating ballots due to a legal contest").

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In sum, Petitioners are clearly protected against even potential and inconsiderable injury by exemptions built into the very federal statute that they invoke, whereas Galvin faces grave and permanent harm to her constitutional rights. Thus, the balance of hardships test establishes that injunctive relief is proper.

## IV. Galvin should succeed on the merits of both claims.

Even if the balance of the harms did not favor Galvin, she should succeed on the merits of both of her claims, which are supported by the plain language of AS 15.15.030(5) and precedential decisions of this Court.

### A. Petitioners' intended ballots violate AS 15.15.030(5).

Alaska law mandates that the Director of the Division of Elections "prepare all official ballots to facilitate fairness, simplicity, and clarity in the voting procedure, to reflect most accurately the intent of the voter, and to expedite the administration of elections." AS 15.15.030. To that end, the statute provides: "The names of the candidates and their *party designations* shall be placed in separate sections on the state general election ballot under the office designation to which they were nominated. The *party affiliation*, if any, shall be designated after the name of the candidate." AS 15.15.030(5) (emphasis added). The statute clearly contemplates two separate and distinct party indicators, and is to be "followed when applicable." AS 15.15.030.

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Omitting candidates' party affiliation constitutes a clear violation of this directive. There is no statutory or legal basis for including only the nominating party (that is, the party designation), particularly when the statute specifically mandates that the "party affiliation, if any, shall be designated after the name of the candidate." AS 15.15.030(5).

**1. Other references to "party affiliation" in Alaska law recognize that the term refers to a person's registration of choice.**

Unlike a candidate's "party designation"—which is, as the phrase suggests, designated by a party—a candidate's "party affiliation" is chosen by the candidate when the candidate registers to vote. The Alaska Statutes' several references to party affiliation make this clear. *See* AS 15.07.050 (providing rules for who may designate a voter's "choice of party affiliation on the voter registration application form"); AS 15.07.070(k)(1)(C) (requiring notification of the process to "adopt a political party affiliation"); AS 15.07.075 (recognizing a voter's affiliation as "undeclared" or "other" based on what the voter declares on a voter registration form); AS 15.25.010 (allowing voters to participate in primary elections according to their registered affiliation); AS 15.25.060 (explaining that "for purposes of determining which primary election ballot a voter may use, a voter's party affiliation is considered to be the affiliation" chosen during registration). And, although the State suggested before the Superior Court yesterday that voters cannot register to vote as "Nonpartisan" or "Undeclared" (and thus that those

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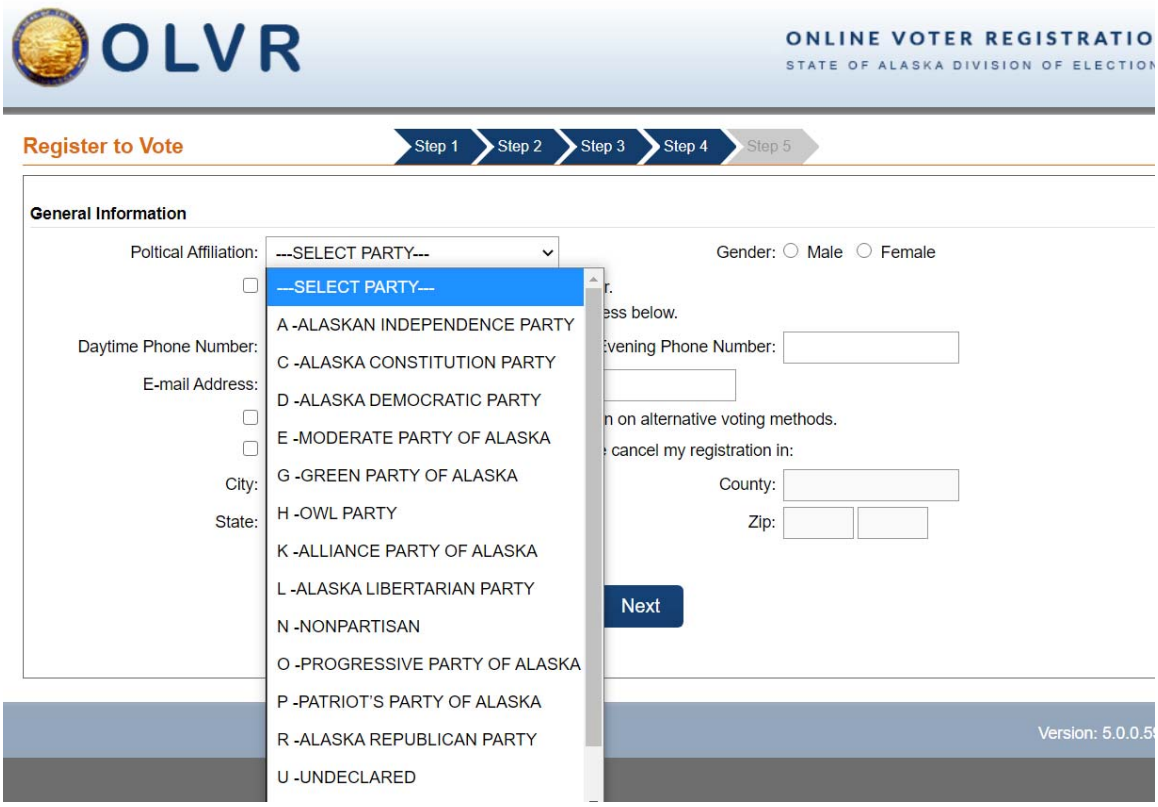
identifiers have no place on the ballot even if "party affiliation" as used in AS 15.15.030(5) did carry some weight), that is demonstrably untrue, as a quick check of https://voterregistration.alaska.gov/ confirms:




By requiring the ballot to list both a candidate's party designation and party affiliation, the statute plainly contemplates two different indicia. AS 15.15.030(5). While Alaskans themselves select whether and with whom to affiliate, "party designation" is necessarily undertaken by an entity *other* than the voter or candidate. Indeed, AS 15.15.030(5) illustrates the plain meaning of this term: "The party affiliation, if any, *shall*

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*be designated* after the name of the candidate" (emphasis added). A candidate's "party affiliation" is chosen by herself, and "designations" are assigned by other actors: a political party may designate its candidates through a primary election, and the Director of Elections is required to make designations on the ballot. Crucially, AS 15.15.030(5) requires the ballot to include *both* Galvin's self-selected affiliation as Nonpartisan, and the Democratic Party's designation of her as its nominee.

Moreover, the State's assertion that AS 15.15.030(5) is merely a positional directive indicating that party information should be listed after the candidate's name fails to account for why the legislature would distinguish between "party designations" and "party affiliations" at all. *See* Pet. at 6. Because the State's conclusory assertions regarding the legislative history do not account for this distinction, they should not be considered determinative of legislative intent. Any other reading would render either "party designation" or "party affiliation" as mere surplusage, against this Court's "rule of construction that 'each section of a statute is presumed to serve some useful purpose.'" *Priest v. Lindig*, 583 P.2d 173, 176 n.8 (Alaska 1978) (quoting *Isakson v. Rickey*, 550 P.2d 359, 364 (Alaska 1976)).

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### 2. *ADP* does not undermine the plain language of AS 15.15.030(5) and does not support the State's new ballot design.

This Court's 2018 decision in *ADP* required Petitioners to permit independent, non-partisan, and unaffiliated voter candidates to participate in Democratic primary elections. In no way did it suggest that once a candidate has been designated by a political party as its candidate of choice that the candidate is then affiliated with that party, as the Alaska Statutes define the term "party affiliation." Party affiliation remains a separate and distinct element—and, importantly, a separate and distinct consideration for voters—which the State has previously recognized, and continued to recognize until the alleged "design" change at issue here.

Petitioners contend that AS 15.15.30(5) cannot possibly require two separate pieces of information because, while the law has gone unchanged for decades, ballots only began including both pieces of information in 2018. But contrary to Petitioners' assertion, this makes perfect sense. Before *ADP* was decided, ballots only needed to include "party designation" to satisfy AS 15.15.30(5), because at that time "party designation" and "party affiliation" were required to be the same. In other words, before *ADP*, there was no possibility for a candidate to affiliate with, or be registered as, a member of a party other than the one that nominated them. AS 15.15.30(5) has always required that Petitioners indicate both pieces of information, it is just that, before 2018,

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the "party affiliation rule" prevented the possibility of those pieces of information not aligning and thereby requiring separate indicators.

Similarly, Petitioners assert that primary ballots are irrelevant here because AS 15.15.30(5) only applies to general elections. Again, before *ADP*, there could be no candidate on the general election ballot whose "party designation" did not match her "party affiliation," because only those with a matching "party designation" and "party affiliation" could ever have been nominated (through a primary) at all. To the extent that Petitioners concede that including both "party affiliation" and "party designation" *is* required to meet the statutory mandate that all ballots, including primary ballots, are prepared to "facilitate fairness, simplicity, and clarity in the voting procedure," the same is true here. *See* Pet. at 10 (citing AS 15.15.030). The State cannot deprive voters of statutorily and constitutionally required information in the name of "fairness, simplicity, and clarity." The State has not and cannot point to anything unfair, unclear or complicated about the 2018 ballots and the 2020 primary ballot that required removal of party affiliation from the 2020 general election ballot.

Petitioners rely on a single sentence in *ADP* to support their new ballot design, *see* Pet. at 14, but that sentence is taken out of context. The full paragraph reads (with the sentence Petitioners highlight underlined):

> On the primary election ballot, the State could simply print next to each

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> candidate's name the political party whose primary election the candidate is running in. On the general election ballot, the State could simply print the nominating party's name next to the candidate's name. The State appears to concede that the primary election ballot can be redesigned, but it is unsatisfied with the resulting general election ballot. The State argues that the possible descriptors for a candidate's party affiliation — such as "nonpartisan," "undeclared," "non-affiliated," or "independent" — are by definition inaccurate, and that whichever word is chosen will cause voter confusion or deception. But we believe the State's concerns underestimate the Division of Elections and Alaska voters' common sense.

*ADP*, 426 P.3d at 913. *ADP* only speaks to one of the two separate and distinct pieces of identifying information required by the plain terms of AS 15.15.030(5), since only one of those identifiers—party designation—was at issue in *ADP*. *Nothing* in the sentence on which Petitioners rely, nor in the paragraph or even decision as a whole, speaks to or erases AS 15.15.030(5)'s plain language requirement that "party affiliation" *also* appear next to a candidate's name on the ballot.

Simply put, *ADP* did not address the precise issue here, nor look at the ballot as a whole. To suggest that the Court overruled the clear requirements of AS 15.15.030(5) in dicta is nonsensical. *ADP* is thus inapposite to Petitioners' position.

### 3. As Petitioners argued in *ADP*, non-compliance with the two separate requirements of AS 15.15.030(5) risks voter confusion.

In 2018, Petitioners argued before this Court in *ADP* that *not* having *both* party affiliation and party designation appear on ballots would "mislead voters by providing

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them with incomplete information." Ex. B, State's 2018 Brief, at 39. The State recognized that, unless both pieces of information are on the ballot, "[v]oters will reasonably assume that the nominee of the Democratic Party is a registered Democrat who identifies with the Party, not a person who refuses to register with it." *Id.* Respondent agrees. But now, it is the State that is forcing that misapprehension upon voters, and unless that is rectified by this Court, there will be no way to determine which voters made decisions in the voting booth based on the false assumption that the State now invites voters to make. The Court should decline to accept any argument that the State now attempts to make to explain away its prior reasoning, which still stands with just as much force today as it did in 2018.

Since *ADP*—up to and including the very recent 2020 primary—the Division of Elections has consistently followed the plain language of AS 15.15.030(5) by indicating party designation in a "separate section[]" from a candidate's chosen party affiliation with a parenthetical "after the name of the candidate," AS 15.15.030(5). As the Court noted, Petitioners have not "asserted any meaningful or cogent reason for not including this information on the current general election ballot" now. TRO Order, Sept. 17, 2020.

In their pending Petition for Review, Petitioners argue that "AS 15.15.030(5) applies only to the general election by its plain terms." Pet. at 10. This, of course, does not undermine plain language of that statute, which clearly requires both party affiliation and party designation. Petitioners go on to suggest that there should be some distinction

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between the primary and general election because, in a primary, "without the candidate's voter registration [party affiliation], voters are likely to be misled into thinking that candidates running in a party's primary are party members." *Id.* The State then asserts that "[t]hese considerations do not exist for the general election ballot." *Id.*

The State is wrong. There is no cogent reason to conclude that voters will make one assumption in the primary and an entirely different assumption in the general election. Simply put, it defies logic to suggest that a general election ballot that says "Democratic Nominee" next to a candidate's name does not risk voters being "misled into thinking" that the candidate is a "party member[]."

To wit: if a candidate walks into a polling booth and knows nothing about any of the candidates running for Dog Catcher, but *does* have a party affiliation preference, logic suggests that the voter will endeavor to vote for the candidate that reflects their party affiliation—regardless of whether any particular party has designated that candidate as its nominee. This is particularly true in Alaska where so many voters choose not to affiliate with one of the two major parties. The converse is also true, since some Alaska voters refuse to vote for candidates who affirmatively affiliate with certain political parties. The current ballot design robs Galvin of the opportunity to reduce voter confusion by confirming to voters that, despite being nominated by the Democratic party, she herself does not affiliate as a Democrat, as the plain terms of AS 15.15.030(5) allow her

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to do.[8]

### B. Petitioners' intended ballots violate both Galvin and Alaska voters' constitutional right to freedom of political association.

The Alaska Constitution grants every person the right to "freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Alaska Const. art. I, § 5. This inherently guarantees the rights of people—and political parties—to associate together to achieve their political goals. *See State, Div. of Elec. v. Green Party of Alaska*, 118 P.3d 1054,1064-65 (Alaska 2005); *Vogler v. Miller*, 651 P.2d 1, 3 (Alaska 1982).

When an election law or procedure is challenged, Alaska courts first determine whether the claimant has in fact asserted a constitutionally protected right. *Green Party I*, 118 P.3d at 1061 (footnotes omitted) (quoting *O'Callaghan v. State*, 914 P.2d 1250, 1254 (Alaska 1996)). Next, the court must weigh and assess "the character and magnitude of the asserted injury to the rights," against "the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.* Finally, courts must "judge the fit between the challenged legislation and the [S]tate's interests in order to determine 'the

[8] To the extent Petitioners rely on non-Alaska case law to suggest that including party affiliation on a ballot is a form of advertising for a candidate, and thus should be disallowed, that directly conflicts with the plain language of AS 15.15.030(5), which unquestionably requires candidates' party affiliations to appear on ballots. "Statutory interpretation in Alaska begins with the plain meaning of the statute's text," which here is plain as day on this point. *M.M. through next friend Kirkland v. Dep't of Admin., Office of Pub. Advocacy*, 462 P.3d 539, 544 (Alaska 2020).

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extent to which those interests make it necessary to burden the Respondent's rights.'" *Id.* "This is a flexible test: as the burden on constitutionally protected rights becomes more severe, the government interest must be more compelling and the fit between the challenged legislation and the [S]tate's interest must be closer." *Id.*; *see also ADP*, 426 P.3d at 907 (applying test to hold that burden imposed by Division of Elections' prohibition on allowing independent and unaffiliated voters to run in Democratic primary elections was not justified given the Alaska Democratic Party's right to freedom of association pursuant to Alaska Const. Art. I, § 5).

As this Court has clarified, the Alaska Constitution is more protective of political associational rights than the federal constitution. *Id.* at 911. And this Court has struck down election laws that impinged upon the freedom of association in the political context on multiple occasions. For example, in striking a law requiring voters to "fully affiliate themselves with a single political party or to forgo completely the opportunity to participate in that party's primary," the Court found that this "place[d] a substantial restriction on the political party's associational rights." *Green Party*, 118 P.3d at 1065.

Article I, Section 5 of the Alaska Constitution also protects a candidate's right to have their "party affiliation" as well as their "party designation" indicated on the ballot. As this Court has noted regarding voters, requiring that one "fully affiliate themselves with a single political party or to forgo completely the opportunity to participate in that

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party's primary . . . place[d] a substantial restriction on the political party's associational rights." *Green Party*, 118 P.3d 1054, 1065 (Alaska 2005); *see also ADP*, 426 P.3d at 909. The same is true here. Omitting Galvin's "party affiliation" from the ballot places a substantial burden on her right to associate, because it means that the state is casting her as being affiliated only with her "party designation," which is simply not true.

While Petitioners now argue in their Petition for Review that Galvin has no constitutional right to have this information printed on the ballot, because the ballot is not "a forum for Galvin's campaign expression," Petitioners misstate the right that Galvin asserts. Petition at 13. Galvin is not seeking to vindicate her rights to speech or expression, but rather her rights to associate with (and the interrelated right *not* to associate with) certain political parties as a voter and an individual.

Moreover, the impact of misrepresenting Galvin—and all other candidates who, like Galvin, do not necessarily affiliate with the same party by which they have been designated—forces the voter to make the same choice that this Court found improper in both *Green Party* and *ADP*: "The choice that the [S]tate forces a voter to make means that a political party [or candidate] cannot appeal to voters who are unwilling to limit their . . . choices to the relatively narrow ideological agenda advanced by any single political party." *ADP*, 426 P.3d at 909 (quoting *Green Party*, 118 P.3d at 1065).

As this Court has recognized, associational rights of parties and candidates directly

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impact the associational rights of Alaska voters, who are entitled to know not only which party ultimately nominated a particular candidate, but also "the ideological cast of the nominated candidates." *ADP*, 426 P.3d at 909 (quoting *Green Party*, 118 P.3d at 1065). It similarly impacts the well-established associational rights of the political parties as well, as "the Democratic Party does not just want primary election candidates who happen to be independent voters, it wants candidates because they are independent voters. Even if federal law does not recognize this burden as substantial, it does not change the magnitude of the burden under the Alaska Constitution." *ADP*, 426 P.3d at 909.

On the one hand, Petitioners' actions in omitting Galvin's voter registration affiliation from the ballot impinge upon Galvin's constitutionally protected right to associate politically as a voter as well as through her party nomination. Petitioners' actions also burden the associational rights of the non-partisan and independent Alaska voters who support Galvin, or who prefer to support other non-partisan or unaffiliated candidates based on their own political associations and affiliations.

And on the other hand, Petitioners have failed to offer any justification for their actions except that their new ballot design will reduce voter confusion. Ex. B at 5 (Petitioners arguing that the only benefit to the State in adopting this new ballot design was to "clean up the ballot" by taking "out unnecessary information" to reflect "[t]he view this would not be too confusing to the voter"). But this Court has already rejected

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that argument, and for good reason. Alaska voters are competent voters deserving of our courts' confidence. *ADP*, 426 P.3d at 913.

Specifically, this Court has rejected Petitioners' similar arguments when they opposed Alaska's use of combined primary ballots, and in rejecting Petitioners' arguments when they opposed allowing the Democratic Party to permit independent candidates to run for their nomination. *See id*. Now, Petitioners seek to recycle that same failed argument in asserting that the ballot design Petitioners themselves created and voters have successfully used in at least three statewide elections, including most recently this past April, have somehow and suddenly become too confusing for Alaska voters to comprehend. But, as our courts have always held, Alaska voters deserve more trust and confidence than that. *See id.* ("We are confident the Division of Elections will be able to design a ballot that voters can understand."). And "[t]he State provides no basis for predicting that Alaska voters will be unable to understand a Democratic Party nominee who nonetheless is, for voter registration purposes, an independent voter." *Id.*

While the this Court did note that the State might otherwise "include prominent disclaimers [along with ballots] explaining that a candidate's party affiliation denotes only the candidate's voter registration and nothing more," it was Petitioners who first elected to include that information on the ballots directly, and in so doing have effectively shown that any putative risk of voter confusion rings hollow. *See supra* at II.A.3.

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Because Petitioners' justifications for omitting Galvin's voter registration affiliation from the ballot have long been rejected by our courts and, to the extent legitimate, are outweighed by the burdens Petitioners' actions impose on the rights to freedom of political association guaranteed to Galvin, Petitioners' intended ballot design is unconstitutional.

## V. Courts regularly grant the precise remedy that Galvin now seeks, finding that any burden imposed on Petitioners is outweighed by the interest in ballots being correct and lawful.

Galvin seeks an order enjoining Petitioners from printing and mailing any ballots that violate AS 15.15.030(5) and Article I, Section 5 of the Alaska Constitution, along with a permanent mandatory injunction requiring Petitioners to print, or re-print, ballots so they comply with constitutional and statutory requirements. This follows *Faipeas v. Municipality of Anchorage*, 860 P.2d 1214, 1216 (Alaska 1993), in which this Court remanded a case to the Superior Court envisioning this precise relief.

Nor is this remedy novel elsewhere. Courts regularly order election officials to reprint ballots under similar situations, and sometimes even to re-transmit amended absentee ballots. *See, e.g.*, *Erlandson, et al. v. Kiffmeyer, et al.*, C7-02-1879 (Minn. 2000) (ordering state to print new ballots printed after Paul Wellstone died and Walter Mondale replaced him as the Democratic-Farmer-Labor Party's nominee for U.S. Senate in October, mere weeks before the upcoming election); *Tsosie v. Navajo Bd. of Election*

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*Sup'rs*, No. SC-CV-68-14, 2014 WL 7251147 (Navajo Oct. 23, 2014) (requiring Navajo Election Administration to immediately re-print ballots to comply with election code and remove name of disqualified candidate); *LaRouche v. Hannah*, 822 S.W.2d 632 (Tex. 1992) (ordering reprinting of primary ballots to include candidate's name); *Taylor v. Kobach*, 300 Kan. 731, 738–39, 334 P.3d 306, 311 (2014) (requiring ballots be reprinted so candidate, who had timely withdrawn his candidacy, would not be included on the ballot); *State ex rel. Peacock v. Latham*, 170 So. 475 (1936) (compelling county boards of elections to re-print ballots in compliance with writ of mandamus); *see also Madera v. Detzner*, 325 F. Supp. 3d 1269 (N.D. Fla. 2018) (requiring 32 of Florida's 67 counties to reprint *sample* ballots to include a Spanish language sample ballot), *order enforced*, No. 1:18-CV-152-MW/GRJ, 2018 WL 7506109 (N.D. Fla. Nov. 5, 2018). In fact, a court ordered a remedy that will require the widespread reprinting of ballots in Texas earlier this week. *See In re Green Party*, No. 20-0708 (Texas Sept. 15, 2020).

Courts have clarified that the means of a state being ordered to reprint new ballots, or even send out amended ballots to correct a material error or deficiency in their initial ballot design, is more than justified by the ends. *See Lenehan v. Township Officers Electoral Bd. of Schaumburg Tp.*, 988 N.E.2d 1003, ¶ 37 (Ill. App. Ct. 2013) ("While [ordering ballots to be reprinted] undoubtedly inconvenienced the election authority, it was early enough that the election day paper ballots could be reprinted in time for election

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day."); *Lenehan v. Township Officers Electoral Bd. of Schaumburg Tp.*, 945 N.E.2d 1175, 1180-81 (Ill. App. Ct. 2011) (noting that, regardless of fact that relief "would require the ballots to be reprinted," any prejudice to state was not the result of any delay on Respondent's part, and burden of reprinting is therefore not relevant); *Brian v. Fawkes*, 2014 WL 5409110, *24 (V.I. 2014) (noting "[t]he sole cost incurred would be the costs associated with printing a new general election ballot, which . . . cannot form a valid basis for declining to enforce [a court order], given that [defendant's] decision not to comply with [a separate] order is precisely the reason why those costs would need to be incurred in the first place.").[9]

Courts have also specifically rejected arguments by states to assert that reprinting ballots would affect the timing of sending ballots to military and overseas voters, even when challenged ballots had already been mailed. For example, in *New Jersey Democratic Party, Inc. v. Samson*, 175 N.J. 178 (2002), the New Jersey Supreme Court held:

> Believing that substantial numbers of overseas ballots already may have been mailed, defendant Forrester claims

[9] *See also* Doug Chapin, *Candidate's Death Prompts Last-Minute Montana Ballot Scramble*, Election Academy (Sept. 23, 2016), https://editions.lib.umn.edu/electionacademy/2016/09/23/candidates-death-prompts-last-minute-montana-ballot-scramble/ (in response to candidate death during the week that military and ballots were required to be mailed, Montana was required to (and did) reprint thousands of ballots in time to meet the deadline).

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> that military and civilian absentee voters may be disenfranchised by the late mailing of new ballots.
>
> *The short answer to defendant's concern is that the expeditious handling of amended absentee ballots will assure that the voters who use those ballots will have their votes counted in the general election*. If [the court] concludes at some point that it is necessary to extend the time for certifying the election to allow absentee ballots to be tabulated, that remedy is also available. *See Harris v. Florida Elections Canvassing Commission*, 122 F.Supp.2d 1317, 1325 (2000) (holding ten-day extension allowing State to count overseas absentee ballots in federal elections to be valid); *see also U.S. v. Wisconsin*, 771 F.2d 244, 245 (1985) (upholding district court order requiring election officials to count certain late-arriving ballots).

*Id.* at 199 (emphasis added). In other words, the remedy Galvin seeks is far from unprecedented, particularly here, where any administrative burden and cost associated with reprinting ballots would be the sole result of *Petitioners' calculated delays* in failing to publicize their change to the ballot design until the week that military and overseas ballots must be sent out. The State appears to be asking this Court to allow the altered ballot to stand uncorrected because it would be too hard to correct a mistake of their own making. The people of Alaska deserve better.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court allow

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the Superior Court's temporary restraining order to stand and preclude Petitioners from mailing and further printing any ballots that do not comply with the law.

DATED: September 17, 2020.

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**CERTIFICATE OF SERVICE**
I hereby certify that on September 17, 2020 a true and correct copy of the foregoing document was sent via Email to:

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